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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of Teacher Education and Certification of the Education Department of the State of New York

and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION AND BRIEF ON BEHALF OF AMICI WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Mexican American Legal Defense and Educational Fund, the Asian-American Legal Defense and Education Fund, and the Washington Lawyers' Committee for Civil Rights Under Law hereby move the Court, pursuant to Rule 42(3) of its Rules of Practice, for leave to file the attached brief as amici curiae in support of affirmance of the judgment below. This motion and the attached brief are timely filed within the time allowed for filing of Appellees' brief on the merits. Appellees have, through counsel, given consent to the filing of this brief. Appellants have declined to consent to this filing, but, through counsel, have advised proposed amici that they will not oppose this motion for leave to file the attached brief amici curiae.

The Mexican American Legal Defense and Educational Fund (MALDEF) was founded in 1968 as a non-profit corporation under the laws of the State of Texas. It is headquartered in San Francisco, with additional offices in San Antonio, Los Angeles, Denver, and Washington, D.C. MALDEF's primary purpose is to secure the civil rights of persons of Mexican descent through litigation and education. MALDEF's client group includes approximately six million Mexican American citizens and permanent resident aliens.

The Asian-American Legal Defense and Education Fund is a national organization, headquartered in New York City. Its purpose is to defend the civil rights of Asian-Americans through litigation and education.

Its constituency includes over two million Asian-American citizens and permanent resident aliens. Those aliens are concentrated in the large industrial states of New York, California, and Illinois.

The Washington Lawyers' Committee for Civil Rights Under Law is one of a number of local affiliates of the National Lawyers' Committee for Civil Rights Under Law. The National Committee was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights for all members of this society. The National Committee's membership today includes three former Attorneys General, eleven past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers.

The Washington Lawyers' Committee has established an Alien Rights Project to provide volunteer legal representation before courts, agencies, and legislative bodies in matters involving the constitutional rights of non-citizens. With the assistance of volunteer private attorneys, the Committee currently is handling twenty-five employment discrimination actions against public sector employers. The Washington Lawyers' Committee also represents numerous aliens in naturalization proceedings and political asylum cases, and in matters which involve equal protection and due process issues.

In support of this motion, proposed amici state that their interest in this case arises out of their long-standing concern for ensuring the full vindication of the constitutional rights of the nation's substantial non-citizen population to equal protection and due process of the law. While the civil rights problems of Mexican Americans and Asian-Americans have much in common with those of other minority groups, in many respects they are unique. The facts and questions we discuss thus differ from those briefed by Appellees, who are citizens of Great Britain and Finland.

Appellees are members of national origin groups which are not ordinarily considered the object of discrimination except that based on alienage. Proposed amici, however, represent members of groups who have been subject to discrimination based on race and ethnic origin as well as alienage. Thus, proposed amici bring to this case perspectives different than those of the parties.

Proposed amici are actively involved in judicial, legislative, and administrative proceedings which concern matters which the resolution of this case may significantly affect. One such issue is bilingual education. Many Mexican American and Asian-American public school children have a right to bilingual educational opportunities. New York, a State with a large Mexican American and Asian-American population, excludes from the workforce a significant number of persons likely to have the bilingual, bicultural skills needed by those children. The statute at issue thus has a particular impact on proposed amici's constituencies.

In addition, through proposed amici's participation in naturalization proceedings and political asylum cases, we are particularly experienced with matters which reflect a non-citizen's commitment to democratic principles and institutions. This experience belies Appellant's assertion that non-declarant aliens lack sufficient commitment and thus should be barred from the public school teaching profession.

For the reasons stated above, the Mexican American Legal Defense and Educational Fund, the Asian-American Legal Defense and Education Fund, the Washington Lawyers' Committee for Civil Rights Under Law move that the Court grant them leave to file their brief as amici curiae.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF), the Asian-American Legal Defense and Education Fund, and the Washington Lawyers' Committee for Civil Rights Under Law are civil rights organizations. Our interest in this case arises out of our efforts to protect the constitutional rights of the nation's substantial non-citizen population.

Many of our constituents, or their immediate family, relatives and associates, are recent immigrants. They, or their forefathers, have come to our shores hopeful that America would afford them an equal opportunity to demonstrate their individual merit and ability. Their decisions to leave their homelands in search of a new beginning demonstrate beyond question their commitment to and appreciation of democratic principles and American institutions.

This nation's constitutional commitment to honor and ensure the dignity of each individual, regardless of nationality, race or ethnic origin, and its commitment to principles of equal protection and due process of law are of paramount importance to those we represent. These principles have inspired the hopes of many that, in America, they indeed would enjoy the freedom and opportunity to realize their full potential, and, in so doing, to contribute significantly to the community they have chosen to make their own.

Yet, at various stages in American history, particularly during periods of high unemployment and economic uncertainty, non-citizen members of this society have been denied the promise of self-dignity and equal opportunity which our Constitution holds out to all. In the period following the First World War--a time of high unemployment and economic uncertainty--various statutes were enacted, including New York Education Law § 3001(3), which by design or effect subjected our non-citizen population to discriminatory treatment at the hands of state governments. Such legislation, which often utilized classifications based upon alienage to reserve opportunities in particular professions to citizens, reflected fallacious and prejudicial assumptions about the nation's non-citizen population. Moreover, as these amici are particularly aware, classifications based on alienage often have reflected invidious and erroneous assumptions about particular racial and ethnic groups.

Classifications based on alienage, such as the classification incorporated in New York Educational Law § 3001(3), impose a badge of inferiority upon the constituencies amici represent. Moreover, by explicitly singling out aliens for discriminatory treatment, such legislative schemes intensify the stigma and injury suffered by individual class members, and enhance racial and ethnic prejudice by legitimizing the demeaning stereotypes upon which the classification is based. Nothing could be more offensive to the fundamental democratic principle of the dignity of each individual.

In 1978, the nation again is experiencing a period of high unemployment and economic uncertainty. As civil rights organizations dedicated to ensuring the constitutional rights of our non-citizen population, amici are particularly aware of the intensification of anti-alien sentiments, sentiments reflected in the media, public opinion, and recently enacted or proposed state and federal legislation. The irony of New York's decision to attempt to defend in 1978 an alienage classification first enacted in 1918 is not lost upon us. New York's defense of the indefensible assumption that aliens as a class lack commitment to and are unfit to teach in public schools unless they declare an intention to seek American citizenship, sharply demonstrates the importance of our efforts and this Court's responsibility to uphold against attack the Constitution's fundamental command that all persons, regardless of race, ethnic origin or nationality, are entitled to equal protection and due process of law.

These considerations and concerns underlie numerous decisions of this Court which have held that classifications based on alienage should be subjected to strict judicial scrutiny. Amici are especially sensitive to the importance of strict judicial scrutiny. In our work, we continually are made aware of the persistence of the anti-alien sentiments which often underlie such classifications. The pattern of legislative responses to our efforts to represent the rights and interests of aliens in Congress and State Legislatures starkly reminds us of the fact that aliens are politically powerless.

Our interest in this case thus reflects our belief that strict judicial scrutiny of classifications based on alienage provide the non-citizen members of this society their only true protection against the discriminatory legislation to which -- because of their race, ethnic origin or alienage -- they often have been subjected. However, the context in which this case arises is also of significance. New York employs approximately 174,000 public school teachers, and our non-citizen constituents have a great interest in the vindication of their constitutional rights to an equal opportunity to compete for those, and other public sector, positions. In this regard, we discuss in some detail principled and objective criteria for determining which public sector positions may constitutionally be reserved for citizens.

Finally, this case involves for amici the confluence of the most fundamental of democratic principles--the dignity and self-worth of each individual member of this society, the importance in a democracy of a system of education which emphasizes the importance of free inquiry and the constant testing of ideas and assumptions, and the overriding significance of the principle that all persons are entitled to the equal protection and due process of law.

SUMMARY OF ARGUMENT

Aliens are denied the opportunity to participate directly in the political process. They are thus especially susceptible to statutory classifications based upon erroneous and invidious assumptions. Their political powerlessness also exposes them to the great risk that legislative enactments capriciously or malevolently undervalue their rights and interests. The history of discriminatory legislation to which aliens have been subjected documents their status as a discrete and insular minority.

Classifications based on alienage are subject to strict judicial scrutiny. Strict scrutiny provides aliens their only protection against the discrimination to which they have often been subjected. Strict scrutiny is required to ensure that the legislature did not act on the basis of inaccurate stereotypes, that the real purpose of the classification is not different from the one asserted, and that there is no less discriminatory means of achieving a legitimate and compelling state interest. The availability of less discriminatory means, or lack of congruence between the classification and its asserted purpose, requires invalidation of the legislative scheme.

New York Education Law § 3001(3) denies non-declarant aliens any opportunity to secure positions as public school teachers. A State cannot constitutionally bar aliens from public school teaching positions. Public

school teachers are not direct participants in the formulation, execution or review of broad public policies. Nor do they perform a function that goes to the heart of representative government. The policy making authority and plenary discretion vested in voters, jurors and police are not vested in public school teachers. Teachers do not exercise sovereign authority. Teachers do not govern.

New York Education Law § 3001(3) cannot withstand strict scrutiny or any lesser standard of judicial review. The classification simply does not serve the purposes for which it was created. It allows certification of citizens and declarant aliens who have no commitment or loyalty to democratic values but denies certification to non-declarant aliens who have that commitment and loyalty. The State is constitutionally obligated to act in furtherance of its asserted purposes through more precisely tailored means: the State's present certification and oath requirements provide the unique opportunity for that precision. In addition, the statute unconstitutionally establishes irrebuttable presumptions--presumptions that serve only to perpetuate longstanding misconceptions about an identifiable segment of the community.

The suspect character and irrationality of New York Education Law § 3001(3) is manifest. The statutory scheme denigrates the right of every person -- citizen and alien alike -- to be judged on the basis of his or her individual character and ability. It repudiates the importance in a system of self-government of the constant testing of ideas and assumptions. The statute is antithetical to democratic values and constitutional requirements.

I. STRICT JUDICIAL SCRUTINY IS REQUIRED OF CLASSIFICATIONS THAT DISCRIMINATE AGAINST ALIENS

Throughout American history, particularly during periods of high unemployment and economic uncertainty, aliens have suffered purposeful, unequal treatment at the hands of state governments. This history of discrimination reflects not only the exclusion of aliens from the political process and legislative judgments based upon inaccurate, invidious stereotypes, but also racial prejudice. It is the political powerlessness of aliens, together with the racial prejudice and history of purposeful discrmination to which they have been subjected, that warrant, and indeed require, strict judicial scrutiny of a classification such as that embodied in New York Education Law § 3001(3).1/

1/ This Court recognized in Graham v. Richardson, 403 U.S. 365 (1971), that "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." Id. at 372. Accord, Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 602 (1976); In re Griffiths, 413 U.S. 717, 721

A. Classifications Based Upon Alienage Are Inherently Suspect and Subject to Strict Judicial Scrutiny

From the time they choose to come to the United States, aliens are saddled with disabilities and government-imposed obligations that are not imposed on citizens. Before they are permitted entry into the United States, immigrants must respond to a barrage of questions concerning their political beliefs and life styles which would violate fundamental constitutional rights if asked of citizens.2/ Once the proper answers are supplied, an alien is permitted to enter the United States, but that entry

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(1973); Sugarman V. Dougall, 413 U.S. 634, 642 (1973).

2/ [I]n the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens."

Fiallo v. Bell, 430 U.S. 787, 792 (1977), quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976). Compare 8 U.S.C. § 1182(a)(28), with Baird v. State Bar of Arizona, 401 U.S. 1 (1971).

is conditioned in a variety of ways not permitted with respect to citizens entering or leaving the country.3/

Once in the United States, additional disabilities are imposed. Thus, for example, aliens must always have in their personal possession federal registration documents and annually must report their whereabouts to the federal government.4/ Further, they are always subject to the federal government's power of deportation--a power that can reach back into an alien's past and even into the past of the naturalized citizen.5/ New York State is attempting to impose an additional disability which would preclude Appellees from working in their chosen profession.

It is beyond question that aliens have suffered a history of purposeful unequal treatment at the hands of state governments.6/ The statutes imposing

3/ See, e.g., Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

4/ 8 U.S.C. §§ 1304, 1305.

5/ 8 U.S.C. §§ 1251 (deportation), 1451 (revocation of naturalization).

6/ While this case pertains to employment discrimination against aliens, the history of unequal treatment encompasses far more than the right to earn a living in the

unequal treatment on aliens with respect to employment have run the gamut from those discriminating in all positions--"regardless of kind or class of work, or sex of workers"7/-- to those which selectively discriminate and, for example, impose citizenship requirements on dentists but not optometrists, on physical therapists but not practical nurses, on professional engineers but not architects. 8/ That unequal treatment is the result

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common occupations of the community. For example, in 1976 the Supreme Court of Virginia invalidated a criminal statute that presumed that if a sawed-off shotgun was in the possession of an alien, it was possessed "for an offensive or aggressive purpose." Sandiford v. Commonwealth, 217 Va. 117, 225 S.E.2d 409 (1976), invalidating Va. Code § 18.1-268.4 (Cum. Supp. 1975).

7/ Truax v. Raich, 239 U.S. 35 (1915), quoting Laws of Arizona, 1915, Initiative Measure, p. 12.

8/ Kulkarni v. Nyquist, 446 F. Supp. 1269, 1272 (N.D.N.Y. 1977), discussing New York Education Laws §§ 6604(6) (dentists), 7104(6) (optometrists), 6534(6) (physical therapists), 6905(6) (practical nurses), 7206.1(6) (professional engineers), and 7304.1(6) architects. Kulkarni invalidated citizenship

of state legislatures acting on the basis of inaccurate sterotypes and not acting to further any legitimate, let alone substantial, state concerns.

This history of purposeful discrimination reflects not only legislative reliance upon inaccurate and invidious stereotypes, but also explicit racial prejudice.9/ The racial impact of

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requirements for civil engineers and physical therapists. New York State enacted a citizenship requirement for animal health technicians in 1976. Brief of Appellants at 31 n.**, citing N.Y. Education Law § 6711(6)) (McKinney's Supp. 1977-78). See also Examining Board v. Flores de Otero, supra (civil engineers); In re Griffiths, supra (lawyers); Sugarman v. Dougall, supra (civil servants); Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) (fishermen); Truax v. Raich, supra (cook); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (laundryman).

9/ See generally J. Higham, Strangers in the Land (1969); H. Kallen, Culture and Democracy in the United States (1951); H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952) (President Truman's Message to the House of Representatives vetoing the Immigration and Nationality Act of 1952).

that unequal treatment is particularly manifest when the history of federal immigration and naturalization laws is considered in light of the New York statute here at issue. The federal government's first naturalization statute, enacted in 1790, restricted eligibility to free white persons.10/ This limitation was patently intended to exclude Negro slaves and Indians from full citizenship benefits.11/ It was not until enactment of the Nationality Act of 1940 that eligibility for naturalization was extended to races indigenous to the Western Hemisphere.12/

Racial exclusions in the naturalization laws, like those in the immigration laws, were enforced chiefly against Asians.13/ For example, the Chinese Exclusion Laws specifically barred Chinese from becoming citizens, and those laws were not repealed until 1943.14/ It

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10/ Act of March 26, 1790, 1 Stat. 103.

11/ See Ozawa v. United States, 260 U.S. 178 (1922).

12/ Nationality Act of 1940, § 303, 54 Stat. 1140.

13/ See generally Gordon, "Racial Barriers to American Citizenship," 93 U. Pa. L. Rev. 237 (1945).

14/ Act of May 6, 1882, 22 Stat. 58; Act of December 17, 1943, § 3, 57 Stat.

was not until enactment of the Immigration and Nationality Act of 1952 that all racial discrimination in this country's immigration and naturalization laws was eliminated.

As enacted in 1918, N. Y. Education Law § 3001(3) required aliens to declare an intent to become United States citizens--and in due course become citizens--in order to be permanently certified as public school teachers. But some aliens, barred from citizenship because of their race, would never have been able to declare that intention. It was not until after 1967 that persons statutorily barred from citizenship were exempted from Section 3001(3)'s application.15/ Thus, historically, the New York statute, when read together with the restrictive federal naturalization laws, denied certain aliens, because of their race as well as their alienage, any opportunity to compete for public school teaching jobs. In light of this history,

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601. Decisions of this Court in the 1920's held that Japanese, Hindis, and Pilipinos were not white persons and thus were ineligible for citizenship. Ozawa v. United States, supra (Japanese); United States v. Thind, 261 U.S. 204 (1923) (Hindis); Toyota v. United States, 268 U.S. 402 (1925) (Pilipinos).

15/ 8 NYCRR § 80.2(i).

strict judicial scrutiny of the statute is appropriate.

Finally, the most salient justification for strict judicial scrutiny of classifications based upon alienage is that aliens as a class are relegated to a position of political powerlessness vis-a-vis the majoritarian political process.16/ Lesser standards of review operate on the assumption that the legislation at issue is a compromise reached between all groups who stand to be affected by the legislation. Those groups--protected by a history of case law guaranteeing their equal access to the ballot and legislature17/--have an opportunity to pursue their own interests, no matter how special those interests might be, and have an opportunity to persuade others to support those interests. It is assumed that this political process will at various times produce victories as well as defeats for

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16/ See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

17/ See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1961).

the groups represented.18/ And there is nothing suspect about the process itself when the defeat acts to the disadvantage of a group having adequate--and equal--representation. Thus, legislation which indeed is the product of the "give and take" of the political process has been afforded a presumption of constitutionality.19/

18/ Viewed historically, and realistically, some of the victories represent a sharing of the "spoils" of the system.

> The widespread exclusion of aliens from [public employment] today may well be nothing more than a vestige of the historical relationship between nonvoting aliens and a system of distributing the spoils of victory to the party faithful.

Foley v. Connelie, 98 S.Ct. 1067, 1077 (1978) (Stevens, J., dissenting). The "spoils system" as the theoretical underpinning of the "special public interest" doctrine has been used by the States to justify discrimination against aliens. This Court expressly repudiated the doctrine in Graham v. Richardson, supra at 374-76.

19/ The absence of that presumption is particularly appropriate with respect to statutes classifying on no basis

The discrimination imposed on aliens, however, does not reflect a mere defeat suffered after full participation by aliens in the political process. Aliens simply have no participatory role. When the group that is disadvantaged by the legislation has been excluded from the political process itself, there is more substance to the concern that disadvantaging the excluded class was in fact the very purpose of the legislation rather than just an "unintended by-product" of legislation designed to serve

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> but alienage. Given the substantial disabilities imposed on aliens, the long history of discrimination they have suffered, and the irrationality of excluding aliens from some occupations but not others, the Court should view with appropriate skepticism a State's claim that its classification was a reasonable response to whatever interest it is now asserting or the result of the "give and take" of a representative political process. The strict scrutiny test--without any presumption of constitutionality -- is an appropriate means to test that skepticism. See Rosberg, "The Protection of Aliens from Discriminatory Treatment by the National Government," 1977 Supreme Court Review 275.

some other legitimate state purpose.20/ That classification, as well as the political process that produced it, is "suspect" and should be subjected to strict judicial scrutiny. Lesser standards of review are inappropriate because they are based on assumptions that have no relevance to a system where the disadvantaged--aliens--because they cannot vote are excluded from participation in the political process.21/

In sum, strict scrutiny provides aliens their only true protection against the invidious discrimination to which they have been subjected. At the same time, however, it affords the State the opportunity to demonstrate that a classification based on alienage is the

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20/ Rosberg, supra note 19, at 301.

21/ See Skafte v. Rorex, 553 P.2d 830 (Colo. 1976), appeal dismissed, 430 U.S. 961 (1977). But see Rosberg, "Aliens and Equal Protection: Why Not the Right to Vote?," 75 Mich. L. Rev. 1092 (1977). The fact that aliens "have no direct voice in the political process" and, as a consequence have been denied assistance "essential to life itself" was key to concluding that discrimination on the basis of alienage requires "heightened judicial solicitude." Foley v. Connelie, supra at 1070.

only way, or at least the most precise way, of achieving a substnatial interest. But when a classification based on alienage does not fit the interest asserted by the State, either because it is overinclusive or underinclusive, the Court must inquire further to ensure that the State is not acting on the basis of inaccurate stereotypes or that the real purpose of the classification is not something different from that asserted. 22/

22/ "[T]he mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

> This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its legislative history demonstrates that the asserted purpose could not have been a goal of the legislation.

Id., citing Eisenstadt v. Baird, 405 U.S. 438 (1972). Under a rational basis standard of review, the Court's scrutiny both of legislative purpose and legislative means has been far less demanding. Thus, for example, the Court has been willing to take

B. Nyquist v. Mauclet Requires That Strict Judicial Scrutiny Be Applied To The Classification At Issue

Under the statutory scheme at issue in this case, aliens who are under no legal bar to obtaining citizenship can declare their intention to become citizens (and then become citizens in due course) and can obtain permanent teaching certificates from the State of New York. This opportunity to remove oneself from the statutory class, however, does not warrant a lesser standard of judicial review of the disadvantages imposed on aliens who choose to retain their foreign citizenship.

In Nyquist v. Mauclet, 432 U.S. 1 (1977), permanent resident aliens

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> the government's explanation of legislative purpose "at face value" and has sustained a consequent statutory classification--even though both over- and under-inclusive--because it was "reasonably related" to that purpose and served administrative convenience by avoiding specific case-by-case determinations. Mathews v. Lucas, 427 U.S. 495, 507-09 (1976). Neither the "face value" acceptance nor the administrative convenience justifications survive stricter standards of review.

challenged a New York Education Law which barred resident aliens from receiving certain educational benefits unless they declared their intention to become United States citizens.23/ There the Court rejected the State's argument that the statutory classification should not be subjected to strict judicial scrutiny because it did "not impose a classification based on alienage," but distinguished between classes of aliens rather than between citizens and aliens. Id. at 7-9.

The Court held that the two key elements in determining whether strict judicial scrutiny would be required of a state statutory classification based on alienage were (1) whether the statute is "directed at aliens" and (2) whether "only aliens are harmed by it."

> The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class. [Id. at 9.]

The fact that aliens could "voluntarily" withdraw from the disadvantaged class was of no importance. 432 U.S. at 9 n.11.24/

23/ At issue was N.Y. Education Law § 661(3) (McKinney Supp. 1976).

24/ Similar statutory schemes that discriminated among classes of aliens were invalidated in Graham v. Richardson, supra, and Takahashi v. Fish & Game Commission, supra. See also Yick Wo v. Hopkins, supra (discriminatory enforcement against only Chinese.)

In the instant case, an identical statutory scheme is at issue. Permanent resident aliens who wish to become permanently certified public school teachers can voluntarily withdraw from the disadvantaged class by declaring their intention to become United States citizens. But, just as in Nyquist v. Mauclet, this does not change the fact that the statute at issue is (1) directed only at aliens and that (2) only aliens are harmed by it. The statute must, therefore, be subjected to strict judicial scrutiny.25/

C. Because Public School Teachers Do Not Hold Policy Making Positions, The Classification At Issue Must Be Subjected To Strict Judicial Scrutiny

In Sugarman v. Dougall, 413 U.S. 634 (1973), the Court held that unless the position from which the state barred aliens was a policy making one which requires the performance of "functions

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25/ The precedential importance of the Nyquist v. Mauclet strict scrutiny standard of review should be given proper deference. See generally Monell v. Department of Social Services of the City of New York, 98 S. Ct. 2018, 2048-50 (1978) (Rehnquist, J. dissenting).

that go to the heart of representative government," the State could not constitutionally require citizenship as a precondition to public employment. Id. at 647. The Court did not articulate what criteria it was using to determine what constitutes such a policy making position. Nor did the Court articulate what criteria it was applying in Foley v. Connelie, 98 S. Ct. 1067 (1978), when it held that police officers were such policy makers.26/ There are, however, objective criteria which can be applied when a state asserts that the position from which it has barred aliens is a policy making one. Because of the history of discrimination against aliens and the importance of the interests at stake, the Court should carefully consider whether these criteria are satisfied. Sugarman v. Dougall, supra at 642-43.

26/ In Foley, Chief Justice Burger concluded that "[the Court's] scrutiny [would] not be so demanding where we deal with matters firmly within a State's constitutional prerogatives." 98 S. Ct. at 1070, quoting Sugarman v. Dougall, supra at 648. The Chief Justice did not discuss, however, what criteria would be applied in ascertaining whether a "matter of State constitutional prerogative" was in fact involved. See also Foley v. Connelie, supra at 1074 n. 1 (Marshall, J., dissenting).

1. There Are Objective Criteria Which Determine Whether a Position Is a Policy Making One

Sugarman v. Dougall, supra, held that citizenship could not constitutionally be required for employment in all State civil service jobs.27/ The Court added a caveat, however, that some civil service jobs could be conditioned on citizenship:

> [Citizenship could be required of] persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. [413 U.S. at 647.]

27/ 413 U.S. at 647:

> [A] flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.

Thus, a State is required to show that the job at issue is an "important nonelective executive, legislative [or] judicial position." Factors relevant to the analysis include how that position is classified vis-a-vis others in the State's civil service, how applicants are recruited and hired, what has been the historical conception of the position, and whether the position is vested with sovereign authority.28/

But in order to establish that the job is in fact "important" so as to bring into play the Sugarman caveat, the State must show that each and every person holding the nonelective position participates "directly in the formulation, execution, or review of broad public policy." Sugarman v. Dougall, supra at 647. For example, a Deputy Clerk of Court may be classified as an important nonelective judicial position; the position might, in terms of judicial

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28/ As Appellees' Brief establishes, under the New York scheme teachers in the overall public employment system are not officers but employees. See, e.g., Corsall v. Gover, 10 Misc. 2d 664, 667, 174 N.Y.S.2d 62, 66-67 (1958); 1963 Op. N.Y. Atty. Gen. 196. The State should be held in this forum to the statutory scheme it has established in its civil service.

management, be "important"; it usually is "nonelective"; and, assuming all government positions must fall within one of the three branches, it is more judicial than legislative or executive. But the State must show in addition that the employment entails a direct participatory role in the formulation, execution, or review of broad public policy, a test which is considerably more difficult to meet.29/

29/ The difficulty of showing both "importance" and the participatory role is graphically illustrated in Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), vacated, 98 S. C.. 2229 (1978). Three lawfully admitted permanent resident aliens challenged the constitutionality of a California statute, California Government Code §1031(a), that required citizenship as a precondition to holding any governmental position "declared by law to be a peace officer or which has the powers of a peace officer." 427 F. Supp. at 159. The three plaintiffs had been denied appointment as deputy probation officers -- defined under the statute as "peace officers" -- because of their alienage. The three-judge district court, relying on Sugarman, invalidated the statute; this Court vacated the judgment and remanded the case for further consideration in light of Foley v. Connelie. But even

An additional criterion further narrows the Sugarman test: the State must be required to show that the direct participation is related to broad public policy going "to the heart of representative government." Id. In other phrasings, the Court has suggested that this criterion is relevant to the "establishment and operation of [the State's] own government," "helps to define

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> if, under Foley, "peace officers" are important nonelective executive positions for which citizenship constitutionally can be required, not all of the "peace officers" under the California statutory scheme participate "directly in the formulation, execution, or review of broad public policy." Sugarman v. Dougall, supra at 647. For under the California classification scheme, "peace officers or [those having] the powers of a peace officer" include voluntary fire wardens, racetrack investigators of the California Horse Racing Board, sextons and superintendents of cemeteries, inspectors of the Board of Dental Examiners, and inspectors of the Bureau of Furniture and Bedding Inspection. It strains credulity to argue that these positions involve the formulation, execution, or review of broad public policy contemplated by Sugarman.

the State's political community," and is directly related to the State's "democratic political institutions."30/

The basic principle of Foley v. Connelie, supra, is that citizens have a right to be governed by citizens. This principle apparently arises from the modern political theory that it is by virtue of citizenship that a person becomes a party to the social contract, and thereby acquires the right and assumes the duty to participate directly in the processes of government.31/ Thus, although the Bill of Rights and the Fourteenth Amendment recognize that all

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30/ Merely asserting that "broad public policy" is involved would not automatically establish that that policy concerns the operation of government. For example, it might be a State's "broad public policy" to have good medical care available for all the State's residents. That, however, does not mean that medical care goes to the "heart of representative government". Thus, the State could not justify a citizenship requirement for publicly employed physicians. See Surmeli v. State of New York, 412 F. Supp. 394 (S.D.N.Y.), aff'd without opinion, 556 F.2d 560 (2d Cir. 1976), cert. denied, 98 S. Ct. 2230 (1978)

31/ A. Bickel, The Morality of Consent 34 (1975).

persons enjoy a natural right to "equal protection of the laws," and to be secure from governmental deprivation of their "life, liberty or property" without due process of law, only citizens enjoy the right to exercise sovereign authority: The authority to vote, that is, to participate in choosing who shall make the laws which govern us all; the authority to legislate, that is, to formulate the policies which all persons are compelled by force of law, to obey; the power to enforce such laws, that is, to exercise the authority, which only the State enjoys, to compel by means of force compliance with such laws; and the power to adjudicate, that is, to determine whether the laws which bind us all have been violated, and to impose penalties for such violations.

2. The Position of Public School Teacher Is Not Vested With Sovereign Authority and Does Not Meet the Sugarman Criteria

The State has not shown, and indeed cannot show, that public school teachers hold the type of policy making positions contemplated by Sugarman for which citizenship constitutionally could be required. Teaching is one of the "common occupations of the community."

Truax v. Raich, supra at 44.32/ It is unrealistic to suggest that each public school teacher "directly participates in the formulation, execution, or review of broad public policy." Nor does the public school teacher's function or authority go to the "heart of representative government."

a. Public school teachers do not directly participate in the formulation, execution, or review of broad public policy.

Public school teachers are hired by the State to teach a State-prescribed course of study in State-prescribed class situations.33/ While each public school

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32/ Statistics support the fact that teaching is a common occupation in the community. It is the third largest occupation in the State, and even when limited to public school teachers (excluding private, college, and university teachers), is the largest public sector occupation. See Brief of Appellees.

33/ The non-high school curriculum includes courses in arithmetic, reading, spelling, writing, English, geography, United States history, civics, hygiene, physical training, New York history, and science. N.Y. Education Law § 3204. The high school curriculum includes a similar listing: English, physical

teacher of necessity brings his or her background, experience, and training to the classroom--factors which are taken into account in individualized certification proceedings--the public school teacher has no role in formulating what courses ought to be taught to his or her students.34/ Nor does the public school teacher review the decisions made by policy-making individuals to determine whether those decisions meet the teacher's own curricula standards. Although public school teachers may, to some extent, execute broad public policies, in so doing they do not perform a policy function.35/ Teachers simply do not possess

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> education, American history, and civics and government. N.Y. Education Law § 3204. In addition, a wide variety of special courses are required. N.Y. Education Law § 801 et seq. See Brief of Appellants at 7-10.

34/ The curriculum has been subject to state standards from the time that public education was first made available in New York. See Brief for Appellant at 9 & n. **.

35/ See Foley v. Connelie, supra at 1075 (Marshall, J., dissenting):

> [T]he phrase "execution of broad public policy" in Sugarman cannot be read to mean simply

executive discretion which is in any way similar to that possessed by police officers.36/

Public school teachers are far more like lawyers than police officers. Neither public school teachers nor lawyers have responsibilities that "involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." In re Griffiths, supra at 724. Neither position "offers meaningful opportunities adversely to affect the interest of the United States." Id. Although both positions involve responsibilities to other parties--the teacher to State and students, the lawyer

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> the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature.

36/ The discretion afforded police officers was key to the Court's holding in Foley v. Connelie, supra at 1072:

> A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment.

to Court and clients--there is nothing in the concept of citizenship that has any relevance in determining who may carry out those responsibilities. Id. Even if there were some relevance, public school teachers and lawyers "are subject to continuing scrutiny by the organized bar [or for teachers, principals] and the courts [or for teachers, school districts]." Id. at 727. Finally, the sanctions of lost bar membership or withdrawn teaching certification are certainly severe enough to "vindicat[e the State's] undoubted interest in high professional standards." Id.

New York State recognizes that its school policy-making functions are divorced from the public school teacher's role.37/ The policy-making function provides for participation by alien parents. Under the State's public school system, registered voters and, to the extent not therein included, the students' parents, carry out policy formulation and review. Public school teachers do not

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37/ Brief for Appellants at 8-9: "The [school] districts have been, and continue to be, responsible for administration, . . . curriculum development . . . and teacher selection . . . under limited statewide standards." By statute community school boards hire and fire teachers, choose textbooks, and "manage and operate the schools." N. Y. Education Law §2590-e.

perform those functions. Community school boards are elected by registered voters and parents notwithstanding the fact that the parents may not be United States citizens.38/ The element of citizenship simply is irrelevant: the concern of the legislature is that "the right to vote for the community school boards which would govern the affairs of the schools" belong to those most directly involved--a category including both citizens and aliens.39/ Those hired to implement school board policies are not direct participants in the formulation, execution, or review of the board's policies. Thus, those employees--public school teachers--cannot be considered Sugarman policy-makers.

b. Public school teachers do not perform a function that goes to the heart of representative government.

Even assuming that all public school teachers hold important nonelective executive positions and that each public school teacher directly participates in the formulation, execution, and review of the State's broad public policy, teaching does not go to the "heart of

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38/ Education Law §§ 2590-c(3), (4).

39/ Letter from Michael B. Rosen, App. at 27-28. See also Special Circular, App. at 29-32.

representative government." Nor does teaching in any way relate to the State's concern for its "political community" or for the establishment and operation of its government.

The police function, on the other hand, has been viewed as reaching to the heart of representative government because of the very nature of the authority vested in the police. Each police officer is clothed with the authority of the State, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 394-95 (1971), and each can wield that authority in exercising "an almost infinite variety of discretionary powers." Foley v. Connelie, supra at 1071. In representing the state's authority and exercising "plenary discretionary powers," police

> affect[] members of the public significantly and often in the most sensitive areas of daily life. [Id. at 1071.]

It is this confluence of state authority and plenary discretion that supports the Court's holding that the police function is related to the State's concern for its political community and to the concept of representative government.

Two other areas where citizenship constitutionally has been required have the same confluence of authority and discretion. Voting--the quintessential political act--is the power to choose

those with authority to legislate. Moreover, it is by its very nature a discretionary act. Thus, voting, that is, "participation in the government policy-making process," constitutionally can be limited to citizens. Skafte v. Rorex, 553 P.2d 830, 833 (Colo. 1976), appeal dismissed, 430 U.S. 961 (1977). The same conclusion applies to jurors. Jurors embody the authority of the state criminal justice system; it is the jurors who are afforded almost unreviewable discretion in making "the ultimate factual decisions on issues of personal liberty and property rights under our system of justice." Perkins v. Smith, 370 F. Supp. 134, 136 (D. Md. 1974), aff'd mem., 426 U.S. 913 (1976). Thus, service on a jury--"one of the institutions at the heart of our system of government"--constitutionally can be limited to citizens. Id.

Because teachers do not exercise the same broad State authority as police, and because teachers have no role--as voters do--in deciding who will exercise the authority of the State, there is no basis for concluding that teaching is a function going to the heart of representative government. The confluence of authority and plenary discretion present with police, voters, and jurors is not present with teachers. Teachers do not exercise sovereign authority.

Because the State cannot establish that public school teachers hold policy making positions or exercise sovereign authority, the alienage classification

embodied in New York Education Law § 3001(3) should be subjected to strict judicial scrutiny.

II. A STATE CLASSIFICATION THAT BARS ALIENS FROM PERMANENT CERTIFICATION AS PUBLIC SCHOOL TEACHERS VIOLATES EQUAL PROTECTION

New York has not established that it has a compelling state interest in barring non-declarant aliens from permanent certification as public school teachers. But even if the state's asserted interests are substantial, it has not shown that the alienage classification is the least drastic means for achieving those interests. In addition, the classification is seriously overinclusive and underinclusive. As a result, it is not appropriately tailored to achieving the State's interests. The classification also establishes an irrebuttable presumption that has no basis in logic or fact. For each of these reasons, the statute should be invalidated.

A. The Alienage Classification Embodied In N. Y. Education Law § 3001(3) Cannot Pass Strict Judicial Scrutiny.

The State asserts that it has a compelling interest in assuring that its public school teachers are personally committed to principles of American democracy, are loyal to the United States, and are "proper" role models for their students. Even assuming that the asserted

interest is compelling, the State also is required to establish that the means chosen to achieve its ends are the least drastic available. In addition, the State must show that the method it has chosen is appropriately tailored to achieve the compelling State interests. The State has not, and cannot, meet those requirements with respect to the alienage classification at issue.

1. The State Has Not Shown That the Alienage Classification in Section 3001(3) Is the Least Drastic Means of Achieving the Asserted State Interest

The State is required to achieve the interests it asserts are compelling by the least drastic means available,40/ and least drastic means certainly is not class legislation. Class legislation is particularly inappropriate here, where two readily accessible alternative methods are

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40/ "Statutes affecting constitutional rights must be drawn with 'precision,' ... and must be 'tailored' to serve their legitimate objectives.... And if there are other, reasonable ways to achieve those goals with a lessor burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" Dunn v. Blumstein, supra at 343 (citations omitted).

available which would pose no additional administrative burdens and would more effectively reach the State's concerns.

a. The individualized teacher certification process achieves the State's objectives

New York State certifies every public school teacher before he or she is eligible to teach in the public schools.[41/] It would pose no additional burdens on the State to use this certification process to achieve its stated objectives. The certification process could identify both alien and citizen teachers not meeting the personal commitment and loyalty requirements, and would permit certification of aliens who did meet the requirements -- such as Appellees in this case. The State should be required to implement this less drastic means of achieving its stated objectives.

b. The State's present oath requirement is a more appropriate means of achieving the State's ends

The State's present public school teacher oath requirement also is a more appropriate means of achieving the State's objectives. Every public school teacher in New York--citizen, declarant alien, and provisionally-certified alien--must take

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41/ See N.Y. Education Laws §§ 3004, 3006.

the following oath before being certified to teach in the public schools:

> I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of . . . (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned. [N.Y. Education Law § 3002.]

The State's purpose in requiring that oath achieves all the goals offered in the State's brief. This oath requirement--designed for the very purpose the State asserts its alienage classification serves--is a more appropriate means of achieving the State's interests. Appellees have, in fact, said that they are willing to subscribe to this oath if it is required for certification. App. at 25.

There is no problem with "aliens" taking this oath. In the first place, temporarily and provisionally certified aliens (those who are statutorily unable to become permanent resident aliens or citizens) take an identical oath and

teach.42/ Moreover, declarant aliens take the same oath in order to be certified and to teach. The State's argument appears to rest on the proposition that aliens voluntarily choosing not to become citizens would -- class-wide -- have difficulty taking this oath in good conscience. That argument was definitively laid to rest in In re Griffiths, supra:

> We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution . . . . If aliens can take [an oath when inducted into the Armed Services] when the Nation is making use of their services in the national defense, resident alien applicants for admission to the bar surely cannot be precluded, as a class, from taking an oath to support the Constitution on the theory that they are unable to take the oath in good faith.43/

42/ N.Y. Education Laws § 3001-a; 8 NYCRR § 80.2(i)(2).

43/ 413 U.S. at 726 n. 18 (emphasis supplied). Griffiths voluntarily chose to retain her Dutch citizenship. Id. at 718 n.1.

The oath requirement, therefore, is a more appropriate means, and one already in use by the State, for assuring that each teacher applicant has the requisite level of personal commitment and loyalty.

2. The Alienage Classification in Section 3001(3) Is Seriously Over-Inclusive

Even if the State were permitted to use an alienage classification instead of more appropriately tailored ways of achieving its stated purposes, the alienage classification it has chosen is seriously over-inclusive. The State is achieving "too much" by the classification. It asserts that it is attempting to staff its public schools with teachers who are both personally committed to principles of American democracy and who are loyal to the United States. Yet non-declarant aliens are, under the classification, excluded from all teaching positions: alien teachers who have a special talent in the arts would be excluded under the classification scheme even though the State has not shown that its asserted interests have any relevance whatsoever to the teaching of art.44/ Similarly, the bar includes all

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44/ Nor would any individual aliens, including Appellees, be allowed to prove that they have the requisite personal commitment and loyalty

the science, all the language, and all the physical education courses included in the state-mandated curriculum. The alienage bar is too absolute and over-inclusive to survive the appropriate equal protection analysis announced in Griffiths: "[T]he possibility that some resident aliens are unsuited to [some teaching positions] [cannot] be a justification for a wholesale ban."45/

3. The Alienage Classification in Section 3001(3) Is Seriously Under-Inclusive

In addition to including in its alien-teacher ban some teaching positions having no relevance to the State's

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because the statute imposes an irrebuttable presumption that aliens do not have those attributes. See discussion in Part II-C infra.

45/ 413 U.S. at 725. This same analysis was critical in Sugarman and reaffirmed in Foley: Even if the State is permitted to use an alienage classification to achieve its end, the State may not "accomplish this end with a citizenship restriction that 'sweeps indiscriminately' . . . without regard for the differences in the positions involved." Foley v. Connelie, supra at 1071 n.5, quoting Sugarman v. Dougall, supra at 643.

asserted personal commitment and loyalty principles, the State excludes some positions where its asserted interests might have relevance. The State mandates the curriculum required of all New York students subject to the State's compulsory education law.46/ Thus, private schools (both secular and non-secular) must teach certain fundamental courses, among them those on American history and government. If the State's "compelling" interests are in ensuring that all students required to attend school be exposed to principles of American democracy from teachers who have a personal commitment to those principles, then it is irrational for the State to apply its alienage bar only to public school teachers. Private school students must be taught those principles yet their teachers can be non-declarant aliens despite the State's assertion that non-declarant aliens are incapable of teaching those principles. Thus, the State's classification scheme is seriously under-inclusive.

46/ Instruction in the private schools must be "substantially equivalent" to that provided in the public schools. N.Y. Education Law § 3204(2). Thus, United States history, civics, and the history of New York are required courses in the private elementary schools; American history and civics are required in the private high schools. N.Y. Education Laws §§ 3204(2), (3)(a)(1).

Under-inclusiveness also is apparent in the regulatory scheme adopted by the State Commissioner on Education pursuant to the 1967 amendment referred to in the challenged statute.47/ While

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47/ There are in fact no standards to guide the Commissioner in the exercise of his discretion under the statute. We know only that the State in 1967 took itself out of the business of barring aliens from being permanently certified as public school teachers, but, at the same time, delegated unlimited discretion to the Commissioner of Education to adopt alienage restrictions. Pursuant to that authority, the Commissioner promulgated Regulation 80.2(i) which permits two classes of alien teachers to be provisionally certified: those possessing unique skills not readily available among citizen teachers and those under a statutory bar to becoming citizens. There is nothing in the statute that prevents the Commissioner from removing those two "exemptions" or adding new "exemptions" tomorrow. For example, the statute would not prevent the Commissioner from permitting the certification of permanent resident aliens of European nationality but excluding permanent resident aliens from Asia; nor is there anything in the statute that

the State is asserting here that citizenship or an intention to become a citizen is the most critical factor in determining whether aliens can teach in the public schools, the regulation promulgated by the Commissioner permits aliens who are statutorily barred from becoming citizens to teach in the public schools.48/ It is irrational to assert

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> prevents the Commissioner from certifying all white aliens to the exclusion of all black aliens. Such standardless discretion violates due process and increases the chances that certain aliens will be discriminated against because of race, religion, or ethnic origin.
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> Unbridled discretion in the hands of government officials has frequently been held to violate the Constitution. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). The same reasoning applies in the instant case, and the statute at issue should be invalidated.

48/ 8 NYCRR § 80.2(i). At issue here is section (2) of the regulation which permits certification of aliens who need not take a stand on whether they would, if asked, voluntarily give up

that alienage is a highly relevant classification for achieving the State's purposes when that very classification scheme does not take into account (under-includes) persons who may be least likely to be committed to or loyal to American democratic principles. This under-inclusiveness and irrationality warrant invalidating the alienage classification embodied in N. Y. Education Law § 3001(3).

B. The Alienage Classification Cannot Pass Lesser Standards of Review Because It Is Based On Class-Wide Stereotypes Having No Basis In Logic or Fact.

Because the alienage classification established by the New York statute in no way fits the asserted interests of the State, it is reasonable to assume that interests other than those now being asserted as "compelling" are in

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their foreign citizenship; they are statutorily barred from becoming United States citizens, and the State does not require more information, such as whether the alien would declare an intention if permitted, before certifying this class of aliens. Moreover, that class also takes the public school teacher's oath, N.Y. Education Law § 3002, a seeming contradiction in the State's argument that an oath requirement would not serve the State's purposes.

fact involved. One such interest might be the "special public interest" doctrine--reserving public employment to citizens alone. Yet this reason clearly is unconstitutional under Sugarman v. Dougall, supra. A second possible interest the classification serves is encouraging permanent resident aliens to become citizens--"encouragement" that takes the form of denying those aliens the right to work in their chosen occupations. This interest is reserved to the federal government alone and impermissible if advanced by the State. Nyquist v. Mauclet, supra at 10. See Part III infra.

A third conceivable interest rests on an unexplained assumption that there is a "difference" between aliens and citizens, a difference arising out of the very fact of citizenship papers and a difference which can appropriately be the basis of State legislation. Yet the most often stated "difference" is but a circular argument that aliens are "different" because they are not United States citizens. That argument fails because discrimination against aliens, if premised on that "difference," becomes but an end in itself.49/ Something more than

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49/ See, e.g., Truax v. Raich, supra at 41-42 ("The discrimination against aliens in the wide range of employments to which the [Arizona] act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their

this conclusory assertion is required. The justification might rest on historical "fears" or on perceived misconceptions of a "typical" alien, newly arrived and having neither knowledge of nor allegiance to American democratic principles. Neither should permit the State to continue a class-wide discrimination against aliens which impairs their "ability to earn a livelihood and engage in licensed professions." Foley v. Connelie, supra at 1071.

Three key stereotypes run through the cases involving discrimination against aliens: that aliens have less of a stake or interest in local community affairs and concerns than citizens have; that aliens as a class lack knowledge of and appreciation for, traditional American democratic values; and that aliens as a class lack loyalty to the United States and to its political and social institutions. Certain of these erroneous stereotypes are mere relics of the past, but others reflect prevailing misperceptions about an identifiable segment of the country's residents.50/

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> alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved.").

50/ Legislation founded on sex-based stereotypes has recently been subjected to careful judicial review

Neither that history nor these misperceptions warrant continued discrimination against aliens. In defending the classification at issue here, the State sanctions these demeaning stereotypes.51/

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> to assure that the classification created by the stereotype did, in fact, bear some relation to a valid government purpose and was not merely a relic of the past:
>
> > [The classification] is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic and overbroad" generalizations . . . or "old notions" . . . that are more consistent with "the role-typing society has long imposed" . . . than with contemporary reality.
>
> Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977) (Brennan, J.). See also Weinberger v. Wiesenfeld, supra; Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Similar careful judicial review of the stereotypes about aliens is warranted in order to see if they bear any relation to valid government purposes and are not merely "archaic and overbroad" relics of the past.

51/ The classification is not only invidious and irrational, but also tends to undermine New York's

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> interests in promoting respect for democratic values, in fostering a sense of community, in instilling public confidence in its educational system, and in providing federally-required bilingual educational opportunities to its public school students. Classifications based on alienage carry with them a badge of inferiorty, stigmatizing members of the disadvantaged class as inherently less worthy than members of the advantaged class. N. Y. Education Law § 3001(3), as the State admits, does indeed assume that non-declarant aliens are "inferior." That assumption offends the fundamental democratic principle of the dignity of the individual. In addition, by its own terms, the statue singles out for discriminatory treatment aliens as a class. The explicitness of that discrimination can only add to the stigma and injury. Thus the statute tends to enhance rather than diminish racial and ethnic prejudice by legitimizing the invidious stereotypes upon which it is based. Further, by denying aliens equal access to public school teaching jobs, the statute tends to undermine public confidence in the public education system. The Report of the Mayor's Advisory Panel on Decentralization of New York City

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> Schools (1967) [Bundy Report] concluded:
>
> > There is wide agreement among qualified observers that the ethnic and nationality pattern of the professional staff has been and still is a reason for much of the disaffection of large segments of the community with the schools. [Bundy Report at 21.]

Finally, N. Y. Education Law § 3001(3) tends to impede the State's efforts to fulfill its federal obligation to provide bilingual educational opportunities for its public school students. See generally Lau v. Nichols, 414 U.S. 563 (1974); ASPIRA of New York, Inc. v. Board of Education of the City of New York, 394 F. Supp. 1161 (S.D.N.Y. 1975); 20 U.S.C. §§ 1703(f), 2000d; 45 C.F.R. §§ 80.3(b)(1), 89.3(b)(2); 35 Fed. Reg. 11575 (1970). Under the terms of the consent decree entered into in ASPIRA of New York, supra, the school district must provide an educational program including "intensive training in English language skills, instruction in substantive courses in Spanish, and reinforcement of Spanish language skills." 394 F. Supp. at 1162. Despite these mandates, a high percentage of school children requiring bilingual or specialized education receive no such

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training. In the State's public schools during the 1976-77 school year, the last year for which statistics are available, 132,174 children were eligible for the bilingual reading programs, 27,414 were eligible for bilingual mathematics, and 28,449 were eligible for English as a Second Language. Of these eligible students, 29,298 participated in the reading program; 8,676 in mathematics; and 13,803 in English as a Second Language. State Department of Education, Bilingual Programs in New York State: Summary of Status of Bilingual Education (1978).

There is a New York-wide and nation-wide shortage of teachers of bilingual education for non- and limited-English speaking children. Among the ranks of permanent resident aliens are many of the bilingual, bicultural people needed to implement required programs and to make them successful. New York State, however, excludes from the workforce the very people who could best teach these school children--teachers who are fluent in English and the language of the student and teachers who have knowledge of the student's culture. Given this concern for the educational needs of New York's

1. Aliens Have as Great a Stake And Interest In Local Community Affairs And Concerns as Citizens

The test of whether one has a stake or interest in any given community depends on one's residency in the community, not one's national citizenship. Permanent resident aliens are permitted by the federal government to enter the United States for the express purpose of making this country their home.52/This

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school children, the alienage discrimination in Section 3001(3) seems particularly irrational.

52/ See 8 U.S.C. § 1101(a)(20); Saxbe v. Bustos, 419 U.S. 65, 68 (1974). Nonresident aliens, on the other hand, are permitted to remain in this country for specific periods of time -- times determined by the federal government before the nonresident alien arrives in the United States. There is nothing inherently contradictory about "nonresident" aliens actually being "residents" of the community because the federally permitted stay is in most cases longer than that normally associated with residency. See Elkins v. Moreno, 98 S. Ct. 1338 (1978). However, the Court need not address this issue because Appellees here are permanent resident aliens.

Court already has acknowledged the contribution aliens make to their community:

> Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities. 53/

To conclude that aliens have less of a stake or interest in their community because of their foreign citizenship alone ignores reality.

New York State specifically recognizes that aliens have a stake in running the public school system in their community. Although denied the opportunity to vote generally, alien parents of public school students may vote

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53/ In re Griffiths, supra at 721. Accord, Graham v. Richardson supra at 376; Rosberg, supra note 21, at 1112.

in community school board elections without regard to citizenship.54/

Nor is there any indication that permanent resident aliens are more transitory than citizens, and, as a consequence, less likely to have a stake or interest in any given community. Even if transience is of legitimate concern to the state or local government,55/ the legislative remedy must be directed narrowly toward the evil--transience--rather than to an unrelated concept--alienage. Appropriate residency requirements could establish sufficient "stake or interest" in the community.

2. Aliens as a Class Do Not Lack Knowledge Of, And Appreciation For, Democratic Values

Although individual aliens, like individual citizens, may lack substantial knowledge about traditional American

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54/ N.Y. Education Law §§ 2590-c(3), (4).

55/ The constitutional right to travel, a right granted to citizens and aliens, could be seriously infringed upon by State or local legislation attempting to establish the "bona fides" of residency. See Dunn v. Blumstein, supra at 338-42; Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). See also Hicklin v. Orbeck, 98 S. Ct. 2482 (1978).

democratic principles, there is no basis for the State's assertion that aliens, as a class, lack such knowledge. Nor is there reason to assume that aliens, as a class, lack an appreciation of democratic values. Aliens, who have made a deliberate choice to leave their "home" country for a new life in the United States, might have a greater appreciation for their new "home" than those who are born here or receive their American citizenship through their parents.

The "lack of knowledge" stereotype is particularly irrational when applied to Appellees. Both are well-educated teachers. As teachers, both are "members of the professions" for whom Congress has provided an immigration preference.56/

56/ 8 U.S.C. §.1153(a)(3). The Immigration and Nationality Act also provides that an alien having a residence in a foreign country which he or she does not intend to abandon may teach in the United States as a participant in a program appropriately designated by the Secretary of State. 8 U.S.C. § 1101(a)(15)(J). In addition, non-immigrant status may be conferred on an alien having a residence in a foreign country which he or she does not intend to abandon if the alien is of distinguished merit and ability, would be a temporary worker in a job for which qualified American workers are not available, or is a

Moreover, the State has provided these Appellees with the graduate education they want to use in the State's behalf. To prohibit them from so doing on the basis of a stereotypic relic of the past is the height of irrationality.

If the State's concern is for knowledge of democratic values, the most appropriate means of meeting that concern is to test for that knowledge, not to assume that one class of persons has the knowledge and another does not. As this Court has stated:

> If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures [the quality] directly. Such a test, fairly administered, would . . . be one

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trainee. 8 U.S.C. § 1101(a)(15)(H). In 1975, 5,631 alien teachers were admitted under non-immigrant classifications and 7,767 were admitted on immigrant visas. Immigration and Naturalization Service, Annual Report: 1975, at 45-46, 71-72. Even more teachers were admitted in 1976: 8,512 as non-immigrants and 8,146 as immigrants. Immigration and Naturalization Service, Annual Report: 1976, at 57-58, 102-03.

> that "measure[s] the person for the job and not the person in the abstract."57/

Such testing would permit the knowledgeable person--citizen and alien--to demonstrate that he or she has the capability to perform the tasks required.58/

3. Aliens As A Class Do Not Lack Loyalty To The United States Or To Its Political and Social Institutions

Prior to their admission to the United States, aliens are carefully screened in ways clearly not permitted with respect to United States citizens who either live in this country or who move here after being born abroad of American parents. Specific statutory restrictions

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57/ Dothard v. Rawlinson, 433 U.S. 321, 332 (1977), quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

58/ A testing requirement of course could not be imposed if not rationally related to the position for which the test is required. Such an unrelated requirement, falling as it might on identifiable classes of citizens and aliens, would run afoul of the equal protection clause under other case law. See Washington v. Davis, 426 U.S. 229 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

are applied against aliens seeking admission who are, or have been, anarchists or communists, or who advocate or teach the overthrow by force of the government of the United States. 8 U.S.C. § 1182(a)(28). In addition, admission is forbidden those aliens whom the consular officer or the Attorney General

> knows or has reasonable ground to believe probably would, after entry ... engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security .... [8 U.S.C. § 1182(a)(29).]

Moreover, aliens -- and citizens -- are subject to arrest for any violation of the espionage or sabotage laws.59/ Finally, the alien is always subject to the dire consequence of deportation.

The United States Government has demonstrated little concern about alien

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59/ It has been persuasively argued that aliens are also subject to the treason laws for while in this country they owe allegiance to it and are not free to give "aid and comfort" to an enemy of the United States. See Rosberg, supra note 21, at 1126.

loyalty for it has subjected alien men to the draft.60/ Surely if concern for

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60/ During World War II, every male citizen and every other male person "residing in the United States" were liable for military training and service. Selective Training and Service Act Amendment of 1941, ch. 602, § 2, 55 Stat. 844. Citizens of neutral countries could be relieved of this liability by applying for relief, but an application so filed would have the consequence of permanently barring the applicant from becoming a United States citizen. Id. There was a dramatic change of policy in the 1951 Universal Military Training and Service Act, ch. 144, §1(d), 65 Stat. 75. No relief was provided; the draft applied even-handedly to United States citizens and aliens admitted for permanent residence. Because the test was "admitted for permanent residence," there was not even a minimal residency requirement placed on alien-inductees. The stereotypic "alien right off the boat" was draftable so long as he arrived in this country as an alien "admitted for permanent residence." See generally United States v. Rumsa, 212 F.2d 927 (7th Cir. 1954). This immediately-draftable policy was changed in 1971 and a one-year residency provision imposed. The draft is but of academic interest

allegiance were class-wide, there would have been no inductions. There seems little reason for State concern when the federal government--whose responsibilities include national defense--expressed none in determining who has been inducted into its armed forces.61/

C. The Alienage Classification In Section 3001(3) Creates An Irrebuttable Presumption That Violates The Constitution.

N.Y. Education Law § 3001(3) establishes irrebuttable presumptions that

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now, but the principle remains that the State has no legitimate interest in perpetuating a "disloyalty" stereotype in the face of this history of federal legislation.

61/ Historically, it appears that the "fear" of disloyalty has been more related to national origin than to citizenship per se. The Japanese curfew and evacuation cases of Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), both involved American citizens who were of Japanese descent. But whether the sterotypes involve national origin or alienage, they are so archaic and overbroad as to be constitutionally prohibited.

non-declarant aliens are not personally committed to democratic principles, are not loyal to the United States, and therefore are not "suitable" to teach in New York's public schools. Those irrebuttable presumptions arise from stereotypic impressions that aliens have less interest or stake in community affairs than citizens; that aliens as a class lack both knowledge of and appreciation for traditional American values and that aliens as a class lack loyalty to the United States and its political and social institutions. As we have already discussed, these presumptions are not "necessarily or universally true in fact,"62/ and indeed are "often contrary to fact."63/ The State's reliance on such demonstrably false assumptions in determining the fitness of applicants for public school teaching jobs is irrational and fundamentally unfair, infringes the basic right of Appellees and other non-declarant aliens to work in the common occupations of their community, and does not relieve the State of substantial administrative burdens. Consequently, Section 3001(3) should be invalidated.64/

62/ Vlandis v. Kline, 412 U.S. 441, 452 (1973).

63/ United States Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

64/ "[A] rule which disqualifies an entire class of persons from

The fact that the irrebuttable presumptions of Section 3001(3) are not universally true and indeed are often contrary to fact is evident upon examination of the statutory scheme itself. New York permits aliens who are statutorily barred from becoming citizens to be provisionally certified to teach in the public school system. Aliens who declare their intention to become citizens may also be certified to teach in the public schools. It should be obvious from the statute itself that it is not the fact that one is an "alien" which is determinative of one's ability to teach democratic principles and ideals. The statute recognizes that aliens can so perform.

Nor does the statutory scheme draw a rational distinction between declarant and non-declarant aliens. First, the State's assertion that citizens and declarant aliens, but not non-declarant aliens, "identify with the democratic principles, values and attitudes they will

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> professional employment is doubly objectionable. It denies the State access to unique individual talent; it also denies opportunity to individuals on the basis of characteristics that the group is thought to possess." Foley v. Connelie, supra at 1076 (Stevens, J., dissenting).

teach" is, at best, naive. Brief for Appellants at 25. In Schneiderman v. United States, 320 U.S. 118 (1943), this Court held that an admitted Communist, who held a leadership position in the party, and believed in the dictatorship of the proletariat, was eligible to declare an intention to become a citizen and to complete the naturalization process. Attachment to the principles of the Constitution, the Court held, does not mean attachment to the political philosophy that informs the Constitution, or to any particular constitutional principle, or even to a republican form of government. Rather, it is sufficient that the applicant for citizenship does not advocate the violent overthrow of the government, even if he advocates its downfall.

President Truman's message to the House of Representatives regarding his subsequently overridden veto of the Immigration and Nationality Act of 1952 similarly exposes the fallaciousness of the presumption--that non-declarant aliens lack commitment to democratic values--that the New York statute creates.

> Today, we are "protecting" ourselves, as we were in 1924, against being flooded by immigrants from Eastern Europe. This is fantastic. The countries of Eastern Europe have fallen under the Communist yoke--they are silenced, fenced off by barbed wire and mine fields--no one passes their borders but at the risk of his life.

> We do not need to be protected against immigrants from these countries--on the contrary we want to stretch out a helping hand, to save those who have managed to flee into Western Europe, to succor those who are brave enough to escape from barbarism, to welcome and restore them against the day when their countries will, as we hope, be free again. [H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952).]

Amici represent many persons seeking admission to the United States who demonstrate the highest commitment to democratic values. For them, the decision to immigrate often involves great personal sacrifice and danger, and the decision to not seek United States citizenship often reflects the fervent hope that by retaining citizenship in the nation of their birth, they may some day be able to return to promote and enhance democratic values. If such aliens are, as a condition to teaching in the New York public schools, required to surrender their foreign citizenship, they may find it difficult, if not impossible, to return some day to their home countries. Fundamental fairness and due process require that New York afford non-declarant aliens an opportunity to demonstrate the often compelling and "inherently democratic" reasons which may underlie their decision to forego United States citizenship.

The primary justification for the creation of irrebuttable presumptions is the administrative convenience involved in applying general classifications rather than in making individualized determinations.65/ If the presumption is founded in fact, the presumption will apply perfectly to everyone within the general classification. Thus, the purpose of the statute, the classification scheme created, and the presumptions employed will match perfectly; there would never be a need to determine whether any single member of the class were improperly included.66/ There is no such perfect

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65/ See Weinberger v. Salfi, 422 U.S. 749 (1975).

66/ For example, if the presumption were universally true that all women four or more months pregnant were medically incapable of teaching, a class of women all four or more months pregnant could be created and excluded from teaching. The classification would, in that instance, exactly match the purpose of the statute -- to prevent medically unfit persons from teaching. But as the presumption moves away from being "universally true" or "true in most instances," the purpose and the classification diverge and, at some point, the

match under Section 3001(3), and individualized determinations are required.

Moreover, New York already individually certifies each public school teacher, whether a citizen or an alien. The State already has taken on the administrative "burdens" that irrebuttable presumptions have been created in the past to alleviate. Consequently, there is little point in New York making individualized certification decisions and at the same time imposing a fundamentally unfair, mechanical rule that excludes from that certification process criteria the State claims are relevant. Due process requires that the State afford non-declarant alien applicants the right during the certification process to rebut the erroneous presumptions Section 3001(3) creates.

In addition to the fact that no administrative convenience would be served

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presumption -- and classification -- must be invalidated. For, at that point, the justification for the irrebuttable presumption --avoidance of administrative burdens -- runs squarely into the fundamental unfairness of including within the presumption large numbers of persons for whom the presumption has no basis in fact. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

by irrebuttable presumptions in the instant case, the individual interest at stake--the right to work--is so important that the Court should carefully scrutinize the irrebuttable presumptions on which the State is relying. The Court's concern about the individual interests at stake in other irrebuttable presumption cases has resulted in the presumptions being invalidated.67/ Thus, because the presumptions in the instant case infringe on vital employment interests of aliens,68/ and because the use of the presumptions does not relieve the State of any administrative burdens, and because the presumptions have no basis in logic or fact, the presumptions -- and the alienage classification -- should be invalidated.

67/ Cleveland Board of Education v. LaFleur, supra (child bearing); United States Department of Agriculture v. Murry, supra (food); Stanley v. Illinois, 405 U.S. 645 (1973) (child custody).

68/ The invidiousness of the classification also has played a role when the Court has invalidated irrebuttable presumptions. See Cleveland Board of Education v. LaFleur, supra (sex); Stanley v. Illinois, supra (illegitimacy).

III. THE STATE HAS NO INTEREST IN REQUIRING PERMANENT RESIDENT ALIENS TO DECLARE AN INTENTION TO BECOME UNITED STATES CITIZENS AND SUCH A REQUIREMENT IS INVALID UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

Permanent resident aliens such as the Appellees in the instant case have a status conferred upon them by federal law.69/ They have a federal statutory right to remain in the United States, and in any particular state, under conditions imposed by the federal, not the state, government. The state has no role to play in the regulation of immigration and naturalization, and it can have no legitimate interest in encouraging permanent resident aliens living in the state to become citizens.70/ Any interest

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69/ Both are federally registered permanent resident aliens. App. at 5, 17.

70/ "The first purpose offered by the [State of New York] . . . [to offer an incentive for aliens to become naturalized] is not a permissible one for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."

the State attempts to assert in this regard would be invalid under the Supremacy Clause.

A. The State Has No Role to Play With Respect to the Regulation of Immigration

The authority to regulate immigration is so exclusively a federal concern that, in the absence of an express congressional delegation, the States have no role whatsoever to play in the area.[71/] No delegation exists that permits the State to set conditions under which permanent resident aliens must, at the penalty of being excluded from their chosen profession, declare their intention to become United States citizens. Even assuming that such a requirement technically would not constitute the "regulation of immigration" so as to be precluded in the absence of express delegation,[72/] the State's attempt to act

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Nyquist v. Mauclet, supra at 9-10. Foley v. Connelie, supra, is distinguishable. See Part I-C supra.

71/ See, e.g., DeCanas v. Bica, 424 U.S. 351 (1976).

72/ See De Canas v. Bica, supra at 355. There can be little disagreement that when state legislation acts directly on lawfully admitted permanent

in this area -- an area in which the federal interest is overriding -- is constitutionally prohibited.

B. The State Cannot Impose Added Burdens on Federally Registered Permanent Resident Aliens

In Hines v. Davidowitz, 312 U.S. 52 (1941), the issue facing the Court was what role the State could play with respect to aliens residing in the United States when the federal government already was regulating in the area. The Court concluded:

> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens ... bears an inseparable relationship to the welfare and tranquility of all the states .... [T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the

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resident aliens, imposes restrictions on that residency, and conditions employment on surrendering foreign citizenship, it so touches the plenary federal power in the area that it must be treated as an invalid state regulation of immigration. See Graham v. Richardson, supra at 377-80.

> national government that where it acts, and the state also acts on the same subject, 'the act of Congress ... is supreme; and the law of the State ... must yield to it." [312 U.S. at 65-66]73/

In DeCanas v. Bica, 424 U.S. 351 (1976), the Court held that this "added burden" was the appropriate test of whether state legislation addressed to "aliens" could survive a pre-emption analysis:

> Of course, state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress:
>
> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See Hines v.

73/ Accord, Mathews v. Diaz, 426 U.S. 67, 84 (1976); Graham v. Richardson, supra at 380.

> Davidowitz, 312 U.S. 52, 66. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." Takahasi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (emphasis supplied) [424 U.S. at 358 n.6.]

In the instant case, Congress has acted to permit permanent resident aliens to live in the United States as aliens under the conditions Congress sets. New York is attempting to place additional conditions on those same persons. The two laws cannot both be valid, and it is the state law that must yield.

IV. CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the Court should affirm the judgment of the three-judge district court.

Respectfully submitted,

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